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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JEFFREY ALAN WALTON, Petitioner V. ARIZONA

CASE NO: 88-7351

PLACE: Washington, D.C.

DATE: January 17, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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JEFFREY ALAN WALTON, :

Petitioner :

v. : No. 88-7351

ARIZONA :

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Washington, D.C.

Wednesday, January 17, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:55 p.m.

APPEARANCES:

TIMOTHY K. FORD, ESQ., Seattle, Washington; on behalf of the Petitioner.

PAUL JOSEPH McMURDIE, ESQ., Assistant Attorney General of Arizona, Phoenix, Arizona; on behalf of the Petitioner.

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PROCEEDINGS

(1:55 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 89-7351, Jeffrey Alan Walton v. Arizona.

Mr. Ford.

ORAL ARGUMENT OF TIMOTHY K. FORD

ON BEHALF OF THE PETITIONER

MR. FORD: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents three issues regarding the constitutionality of aspects of Arizona's death sentencing statute.

I'd like to begin by briefly addressing the last of those that is discussed in our briefs, the constitutionality of the provision of Arizona law that makes murder a capital crime if it is committed in an especially heinous, cruel or depraved fashion.

That issue is before the Court, of course, in another case, Lewis v. Jeffers, which will be argued I believe immediately after the recess the Court is about to take.

And it is our submission, as it is the submission of the Respondent in Lewis, that the case is directly controlled by this Court's decision in Maynard v. Cartwright, holding almost identical language in the Oklahoma statute to have failed to control sentencing

discretion.

The -- Professor Rosen, who wrote the seminal article on this -- it was relied on in Maynard and also the Ninth Circuit Court of Appeals en banc and the Adamson case, have also reviewed the Arizona statute, its application, in great detail, and come to the conclusion that there is no way in which it can be distinguished from the Oklahoma statute in Maynard.

Since Adamson, of course, the Arizona court has gone even farther. This case was decided by the Arizona Supreme Court after Adamson, and that court continued to take steps to stretch the breadth of this aggravating circumstance even to greater lengths.

In this case, affirming a trial judge's finding of the aggravating circumstance which was unadorned by any explanation of what the trial judge's understanding of what the circumstance meant, which followed arguments by the prosecution with regard to an interpretation of the statute which the Arizona Supreme Court rejected.

And in this case, the Arizona court took the final step in a series of decisions by which it ultimately said that the fear of a robbery victim, a person who is not necessarily even going to be the victim of a homicide, the uncertainty of -- as to the person's fate is sufficient to constitute suffering which is sufficient to constitute

cruelty, which is sufficient to make out the statute and qualify a defendant in that kind of a case for a sentence of death.

And in this case, as we pointed out in our --

QUESTION: That -- that is different from -- from just in the course of a robbery suddenly shooting someone. I mean, I -- I suppose holding someone hostage in -- as occurred in this case, debating with your accomplices whether you will kill him or not while he's lying there on the ground -- I suppose that is something in addition to merely killing somebody in the course of a robbery, isn't it?

MR. FORD: Well, I can't refrain, Justice Scalia, from pointing out that there isn't, of course, any testimony that such a debate occurred. That -- that debate is a product of the rhetoric of the Arizona Attorney General and the Arizona Supreme Court. According to the witness, the discussion was over what the person would be tied up with.

But, again, to take the Court's hypothetical, there are always those facts that can be said to distinguish one homicide from another, to constitute as -- cruelty because every homicide, as the Court has pointed out in Maynard, is -- could be said by a reasonable person to be cruel.

You can always find a fact in any case that says,

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well, that's a cruel fact. That's different than some other cases.

QUESTION: Well, what about this -- how about the fact that Justice Scalia points to? You say it's a hypothetical but, nevertheless, that's what the -- that's what the Arizona Supreme Court recited. And what about that fact?

MR. FORD: Well, if the Arizona Supreme Court had said that discussing whether or not to shoot a person in -- - in his presence was an aggravating circumstance -- and that was the definition of this aggravating circumstance -- - that would be, of course, a different case. They never said that --

QUESTION: Well --

MR. FORD: -- until this case, and I'm not sure they said it in this case.

QUESTION: Well, what if they did say it in this case?

MR. FORD: Well, if they did say it in this case, the point -- our point again -- remains, Justice White, that they never said it in any case before and in many other cases where it occurred before that was --

QUESTION: Well, I know, but they -- they carried out an independent review of the death sentence and they said here is what cruelty is. It's either this or that. And

whatever it is, it's present on the facts of this case. That's what they said.

MR. FORD: Well, of course, and that's what the Oklahoma Court of Criminal Appeals said in Maynard as well. And what this Court said was that that doesn't satisfy the requirement of Furman and Godfrey, that in -- Furman and Godfrey require that a definition of some sort be fashioned that then constrains the discretion of sentencers after that fact. And that's never happened in Arizona. The --

QUESTION: Well, Arizona -- the Arizona court purported to exercise its authority -- an authority under state law to affirm the -- the death sentence despite any -- any evidence that the sentencer below had that in mind.

MR. FORD: Yes.

QUESTION: They said, here is a -- here is -- here is what cruelty is, and on the facts of this case there was cruelty.

MR. FORD: That's correct.

QUESTION: But you say that is contrary to Maynard?

MR. FORD: It seems to me that that's exactly what the court of criminal appeals did in Maynard and in actually in some ways worse because in a court of criminal appeals in Maynard we had a jury instruction -- we knew what that jury was told constituted heinous, atrocious or

cruel.

In this situation, because we don't have -- we have bench trials in Arizona, and that's an issue I want to come in a second -- we don't know what definition was used. The trial judge never said, I'm applying this definition.

And the Arizona Supreme Court has said in the past and very critically in the Rumsey case that came to this Court that it is not the sentencing body, that it is a reviewing body, and the discretion that is to be confined I think is the discretion of the sentencing body that can be controlled by rules set in advance and not just changed on a case-by-case basis as cases are analogized to facts that may have been incidental in a prior crime and then become the sine qua non of this factor.

I would like to spend some time talking about the first issue in this case. It is a classic conflict between the expansion of judicial power at the expense of the traditional role of one of our democratic institutions, the criminal trial jury.

The State of Arizona here is claiming that it may transfer the most basic core functions of the trial jury to a judge -- take it away from the jury where it has been for at least 300 years in English and American law, by simply changing its label. By calling it an aggravating

circumstance.

And if that can be done with the facts that are in their present statute and any fact -- they've given no standard by which this Court would say what facts can be changed by that labeling devise and what cannot.

QUESTION: Is this to you a violation of the Sixth Amendment or the Eighth Amendment or both or --

MR. FORD: This is a Sixth Amendment issue, Mr. Chief Justice, and Fourteenth Amendment as well because the specific intent of the framers of the Sixth Amendment in 1791 and the Fourteenth Amendment in 1868, as evidenced by the commentators, as is evidenced by the words of Justice Jay three years after the Sixth Amendment was written, as evidenced by the Colonial and English history of what a jury was, everyone agreed ad quaestionem facti non respondent Judices -- judges could not answer question of fact.

QUESTION: Well, how do you get around our Hildwin case?

MR. FORD: Well, the Hildwin case, Your Honor, I think takes us right to the threshold of what the framers were trying to preserve for the jury. But the Hildwin decision, as I understand it, involved a unanimous recommendation by a jury under Florida law that implied that that jury had unanimously found at least one and

probably many aggravating circumstances.

QUESTION: Yeah, but there was the trial judge who carried out -- who had the final say.

MR. FORD: Well, the trial judge has the final say on sentencing. And this Court in Spaziano held that judges may have the final say on sentencing, as judges have in many jurisdictions for hundreds of years.

But on findings of fact that make a person eligible for this sentence, the judges in England and America have never had that authority.

QUESTION: Yeah, but the judge in Florida does.

MR. FORD: Well, the judge in Florida -- as I understand Florida law, in the --

QUESTION: Well, have you -- you must take it as we understood it in Hildwin.

MR. FORD: Okay. Well, as I -- as the Court wrote about Florida law -- and I thought the Court was quite careful in many of the things it said and how it addressed Florida law --

QUESTION: Well, what do you do about Cabana?

MR. FORD: What Cabana involves is -- as the Court -- I reread Cabana last night and it explains very carefully that the finding of fact that's involved there is --

QUESTION: I know, but in -- he -- that -- that --

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that defendant was not eligible for the death penalty unless it was found as a matter of fact that he killed or intended to kill.

MR. FORD: And -- and as the --

QUESTION: And we -- I thought we indicated that that wasn't necessarily a job for a jury.

MR. FORD: Because that requirement was imposed by the Eighth Amendment and -- by the Federal courts as a matter of their proportionality review under the Eighth Amendment. That traditional judicial function.

And this was a benchmark that courts were to use as -

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QUESTION: Well, that may be so, but -- so that your generality, the way you put it, isn't quite true, that -- that if a -- if a fact is necessary to make somebody eligible for the death penalty, it must be found by the jury.

MR. FORD: If the fact is eligible --

QUESTION: That's what you said.

MR. FORD: That's correct. But the fact -- the eligibility is established by law. The due process clause says no person shall be deprived of life without due process of law.

In our Federal system the states, by their statutes, say what is necessary for a deprivation of life or a

deprivation of liberty. This Court, and under the Fourteenth Amendment in this context and others, then looks to the process by which those facts are found to see whether the due process clause was complied with.

QUESTION: I -- I take it that a sentence enhancement statute enhancing the sentence if a bank robber carries a gun, in your view, would have to be submitted to the jury?

MR. FORD: Certainly not under McMillan v. Pennsylvania. If, as in McMillan, number one, the state said -- and I thought this was an interesting part of McMillan I had overlooked when we wrote our reply brief -- the State of Pennsylvania said this is not an element. Arizona has never said that. That doesn't appear in this case at all.

QUESTION: Well, do you --

MR. FORD: Number two --

QUESTION: Do you say then that this is an element of the offense?

MR. FORD: This is necessarily an element of the offense as that term is understood everywhere in the law. It is a fact about the offense itself. There must be --

QUESTION: Well, every -- everywhere in the law does the jury have to be separately instructed on the difference between -- two different charges, felony murder or -- or murder by the perpetration of the defendant?

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MR. FORD: I -- as I understand it, juries do in Arizona and everywhere have to be instructed on those. They don't necessarily have to specify which they found, but they must be instructed that they have to find all of those elements that make up one of those two theories.

And that's very much what I understand the Court in Hildwin to have said. The jury in Hildwin was able to recommend death unanimously as it did because it found some aggravating circumstances.

QUESTION: But take -- take this sentence from, Mr. Ford, from Hildwin: The ultimate decision to impose a sentence of death, however, is made by the court after finding at least one aggravating circumstance.

MR. FORD: That's correct, Your Honor.

QUESTION: There it was made by the court after the court found an aggravating circumstance.

MR. FORD: That's correct. And the court has to identify those circumstances, as I think Justice Stevens explained in his Barclay opinion and the Spaziano opinion with regard to what Florida law is about.

Those findings are designed and were put in the Florida statute for judicial review. They -- by statute they are not exclusive factors. By statute you can have non --

QUESTION: But see -- you know, you've made this very

broad statement here that all facts must be found by a jury under the Sixth Amendment. And then you've been presented with five or six -- you know, what I suppose you call exception -- and you've said, well, these are all exceptions.

But that casts some doubt on the statement as your -- your generality.

MR. FORD: I think not, Mr. Chief Justice, because what I'm talking about are the terms, as these terms would have been understood in 1791 and in 1868. I'm talking about the term --

QUESTION: Well, what -- what -- what would have been understood about aggravating circumstances in 1791? Nobody ever heard of them.

MR. FORD: Well, they -- though that particular phrase wasn't used -- I'm not sure the phrase "elements of the offense" was used at that time. But what was known is that certain facts were prerequisite to a deprivation of life or liberty and that those facts that the law -- the statutes -- made prerequisite to a deprivation of life or liberty were for the jury.

Now, the facts that may have had to do with what sentence should be imposed, such as --

QUESTION: Well, you're just arguing that Hildwin is wrong.

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MR. FORD: Well, I think not. I think that I'm arguing that if -- Hildwin, certainly, Mr. Chief Justice, could be extended logically to incorporate the Arizona statute.

QUESTION: Well, how --

MR. FORD: But if it does, then --

QUESTION: How does -- does it differ?

MR. FORD: It differs because the statute is written differently, because the statute talks about these factors as considerations and the determination is whether they are sufficient. That they are not sufficient -- a finding of one aggravating circumstance is not a sufficient condition for imposition of the death sentence in Florida.

The -- the fact that it's a necessary condition is a --

QUESTION: Well, what --

MR. FORD: -- judicial one that --

QUESTION: Why should that make any difference, the fact that one aggravating circumstance isn't enough to impose the death penalty in Florida?

MR. FORD: Yes --

QUESTION: How is that distinguished for Sixth Amendment purposes?

MR. FORD: Because an element of the offense is a discrete atomic sort of -- that's why I think maybe we

call them elements. That's where the metaphor may have come from.

It is -- once it is proven, you are eligible. It is the factual prerequisite to the determination of punishment that may be made by a judge. But the factual eligibility is concretely defined in the law of Arizona, concretely defined in the law of homicide throughout the country and in the very many other states that don't have this kind of a provision in Arizona.

In Florida, the -- the facts are -- are quite distinctly described as considerations. And the question is whether there is a sufficient number. And they are balancing elements and they are not something that is -- is set out by the --

QUESTION: Well, a judge can make findings that the considerations existed, but a jury has to make findings that aggravating circumstances existed.

MR. FORD: No. The jury has to make the findings that make the person eligible by law for the imposition of the sentence. Once this judge --

QUESTION: Well, but no. Those -- those findings in Florida made the person eligible for a sentence by law.

MR. FORD: Well, as I understand, the way that the Florida statute is written, Mr. Chief Justice, is that those factors are there to be identified so that appellate

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courts can look and avoid arbitrariness by saying, here are the factors that are -- were in this case; we're looking at comparative cases; we have reasons stated on the record.

Those kinds of reasons for judicial opinions, very much like the reasons of the Defendant's -- the Enmund factors that the Court said that could be found by a judge in Cabana are not the kinds of core elements -- and I guess my point is that, sure, the line is a thin one here, but if you -- there is no line whatsoever between the Arizona statute and Justice Stevens' hypothetical in McMillan where the states say the crime is assault and it's an aggravating factor, that it was a homicide or the person died or it was premeditate or it was intent to rape --

QUESTION: Well, Arizona still has a series of elements in the offense that the jury has to find to make you come within a definite first step of a capital sentencing process.

MR. FORD: They have the traditional first-degree murder. But the Arizona legislature has decided that absent proof beyond a reasonable doubt of certain discrete limited factors by evidence which is admissible under the rules of criminal procedure, another difference between that and Florida, that is a -- both a necessary and

sufficient condition for imposition of the death penalty -- also different than Florida -- and it shifts the burden of proof to show -- to the defendant to show that he should not be sentenced to death.

Now, if that is not an element of the offense, I don't know what is, and the State of Arizona has never answered the question what is in the many arguments we've had over this.

There is no other line that anyone has suggested could be drawn. And this line was fought over. It was put in the Constitution twice because of just this kind of usurpation by the Crown in England under the Stuarts where they tried to take away from juries the power, say, in William Penn's case, to determine whether or not the -- the facts were true. And they tried to penalize juries for returning false verdicts.

The cornerstone basis of the right to jury trial was that the judge could not say that the fact was false. And if the judge can say that the fact is false, why shouldn't juries be held in contempt? Why shouldn't verdicts be directed, as Justice Scalia pointed out in his Carrella opinion?

This is the bedrock definition of the jury trial that was never in debate. The debate in 17 -- in the 18th century was whether or not juries should decide the law,

whether or not juries should sentence. As Justice White's opinions in --

QUESTION: Mr. -- Mr. Ford, how do recidivism statutes work? Do you -- do you know if -- if it's for the court to determine whether the offender is a habitual offender?

MR. FORD: They vary in many ways. The -- there are -- most statutes that I'm aware of, including Arizona's, have a jury decide whether or not the person is a habitual offender.

There are statutes, and there are a variety of these things, Justice Kennedy. And the Court has said, as it did in McMillan, there may not be a bright line here, but the -- most cases -- statutes that I know of are like the one in McMillan where you're not creating eligibility for a qualitatively new kind of punishment; you are simply raising a minimum term. You're doing the kind of thing a parole board might do later on because the legislature has determined that you're eligible to have your liberty deprived up to a length of time based on these other facts, and this is just an additional fact that may raise the minimum.

In McMillan the Court was very explicit in distinguishing that from -- and especially from this where you're talking about a qualitatively different punishment,

one that is described by a different word in the Fourteenth Amendment.

And you can't get there, under state law, unless these facts are proven. And if -- and those, I think, are very different kinds of facts than -- than most recidivism statutes.

Now, the when the Oregon Supreme Court struck down its statute --

QUESTION: Well, of course, it -- it does -- it does seem to me that this jury found the defendant guilty of murder as specified in the statute and that for double jeopardy purposes, for finality purposes was complete when the jury was instructed on the elements of the offense without reference to the aggravating and mitigating character -- character of the act.

MR. FORD: He was convicted of first-degree murder. He was not yet eligible to the sentence of death. Under Arizona statute, to be eligible for a sentence of death, the state had to additionally prove facts by competent evidence beyond a reasonable doubt, a specific listed number of -- of discrete facts and then the burden would shift to show that -- to the defendant to show his life should be spared.

QUESTION: Well, I suppose under the Federal sentencing guidelines there are any number of -- of

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different factual circumstances that the trial judge finds on sentence. The jury doesn't have anything to do with it.

MR. FORD: That's correct. And the Congress has carefully refrained from enacting this kind of a statute that makes an exclusive list of factors describe a particular sentence. The list of factors are factors. The judge can depart from those factors by giving reasons. They are not exclusive. They are not limited, and they do not change the --

QUESTION: You mean the more facts the judge can find, the -- the less need there is for the fact-finder under your theory?

MR. FORD: The -- when -- yes, exactly, because that's what the Court said in Spaziano. When you're talking about sentencing, you're talking about -- and the Court has said in Ramos -- that you're talking about a different kind of issue. You're talking about one that involves everything. A reasoned moral response to a person, his whole life, to an event, to all aspects of it in a way that cannot necessarily be predicted.

That's why you don't cabin these into a -- into a particular set of facts. But when you talk about a crime, you're talking about specific individual facts that can't be substituted for that are limited by law. And that's

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exactly what Arizona has done in its different characterization of what is an aggravating circumstance than Florida has.

Now, Florida case law has evolved partly, as Justice Stevens' recognized in Barclay, under this -- under what -- under the impression of what this Court required, to look more like Arizona. But the statute, I think, that Patterson v. New York says, a statute is what describes the minimum. And the statute is what I think the Fourteenth Amendment looks like.

Another way to look at this, I think, is the way the Court has in the due process cases where the state has created a liberty interest. You have -- we have a finite number of factors that specifically controls discretion. Then a liberty interest attaches and the question -- the due process attaches, and the question is what process is due.

And the frames of the Sixth and Fourteenth Amendments this Court has said when it's incorporated -- has said that they understood the process due for a fact that is prerequisite to a deprivation of life or liberty to be trial by jury. And they said it twice, and they said it explicitly.

Now, that jury may vary in -- in its composition. There may be various rules about whether its unanimous

vote is required or not. Those kinds of things have changed, and they changed before the Constitution was written. They were in flux in 1791. That's why this Court has allowed variation under the Fourteenth Amendment and in 1868.

But this never changed. We have our -- our citations run from 1458 up through the turn of the century and even in cases that -- as recently as last summer. And those citations have never changed, and that understanding of what trial by jury applies to has never changed.

And unless there is some law, unless there is some line that the state has never described to us that lies between these facts and -- again, Justice Stevens' worst case hypothetical in the McMillan case, then I don't know what is going to be left potentially of the Sixth Amendment in the third century of the Constitution because juries are sometimes a little intractable.

They're inconvenient, they don't necessarily go along with what the government wants, they don't necessarily find the facts the way the -- as Justice White pointed out in Duncan -- that the more practiced and professional eye of a judge would like it, and people often try and make incursions on their power. And that was a major source of the battle that left -- the legal battle that led to the Declaration of Independence and the Constitution of the

United States protecting that right in criminal cases.

And I don't know where the line is if it doesn't encompass this kind of a statute, which in every characteristic but label is the equivalent of the elements of a crime.

I would like to save some rebuttal time, so unless there's other questions --

QUESTION: (Inaudible) your other issue, I suppose.

MR. FORD: The other issues are difficult for me to argue, Justice White, because the Court has other cases that are so close to them. Our statute is more extreme than those -- those cases, those statutes from Pennsylvania and California.

They -- this statute includes all the problems of mandatoriness and limiting litigation, and in addition, it has this presumption of death that we've talked about. But, in my limited time and the number of issues I have, I would like to reserve that because I know the Court is giving that a hard look in those cases.

Unless the Court has questions --

QUESTION: Thank you, Mr. Ford.

Mr. McMurdie.

ORAL ARGUMENT OF PAUL JOSEPH McMURDIE

ON BEHALF OF THE RESPONDENT

MR. McMURDIE: Mr. Chief Justice, may it please the

Court:

Petitioner raises essentially four contentions challenging their -- the constitutionality of the Arizona death penalty statute.

I too would like to begin in inverse order as they appear in the brief and begin with the constitutionality of the Arizona Supreme Court's definition of the aggravating circumstance of especially heinous, cruel or depraved.

In Maynard v. Cartwright, this Court reviewed Oklahoma's aggravating circumstance of especially heinous, atrocious and cruel and found it to be unconstitutionally vague because the Oklahoma courts had refused to define the term to inform the sentencing jury what facts it was -- must find to impose death.

It was this lack of definition that left the sentencing body with the discretion to impose death whenever it desired, in violation of Furman.

Arizona has not left its corresponding terms of especially heinous, cruel or depraved aggravating circumstance so ill-defined. The Arizona Supreme Court has taken the terms and divided into two separate categories.

The existence of facts which would support the definition in either category will find -- will make it so

that the aggravating circumstance is found.

The first prong of the test is cruelty, and it's proved when the state presents beyond a reasonable doubt that the victim consciously suffered mental anguish or physical pain prior to death.

The second category is heinousness or --

QUESTION: I mean, is that whether or not the -- the defendant knew that and intended that?

MR. McMURDIE: Justice Scalia, the --

QUESTION: Because here -- here that obviously occurred. The --

MR. McMURDIE: He did know because --

QUESTION: -- victim was blinded by -- by the shot in the head and wandered around in the desert for five days before he finally died of starvation, as I gather.

MR. McMURDIE: That's correct. And the Arizona Supreme Court said those facts did not support the finding because the defendant did not know or could not reasonably foresee it. It's the foreseeability test that was -- what was addressed by the Arizona Supreme Court in State v. Adamson. The defendant does not have to intend that his victim suffer so long as he knows or should know that his acts are causing the mental anguish or the physical pain.

The second category is heinous or depraved.

QUESTION: Now, Arizona does not require the trial

judge to spell out what factors of the crime make -- make it especially heinous and cruel?

MR. McMURDIE: Your Honor, in order to understand that you have to understand --

QUESTION: Yes or no?

MR. McMURDIE: The -- the facts do not have to be specified in the written order.

QUESTION: It would certainly make it easier on appellate review, wouldn't it?

MR. McMURDIE: Your Honor, how it comes to appellate review is what I was trying to get into. In --under the state due process, the state must notice those aggravating factors it intends to pursue and specifically list the facts which would support the aggravating circumstance.

And that was done in this case. The state gave notice that it was going to seek the aggravating circumstance of especially heinous, depraved -- cruel, heinous or depraved, under both prongs of the test.

QUESTION: But you nonetheless do not know which factors were relied on and found to exist by the trial judge?

MR. McMURDIE: The trial court stated that it found the circumstance -- it stated it found cruel, heinous or depraved. It said -- did not say that it rejected either of the fact patterns proffered by the state.

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On independent review the Arizona Supreme Court looked at the facts offered by the state and found by the trial court to exist based on its finding and said that only on one set of facts did it support the cruelty finding, that of the mental suffering prior to the shooting, which was alleged by the state in the sentencing memorandum.

QUESTION: Well, I take it the definition of cruelty that the supreme court articulated in this -- in its opinion in this case was -- had been previously articulated --

MR. McMURDIE: Yes, Your Honor.

QUESTION: -- in the two or three cases they cited.

MR. McMURDIE: Many, many times. It has been articulated in State v. Lujan.

QUESTION: So, I suppose you can assume trial courts know what the law is, what the definition of that --

MR. McMURDIE: That was the second area I was getting -- that the problem with Maynard is that the sentencing body, the juries, were not given instructions on what the definition of the law was to inform them what facts were necessary to be found.

Trial courts do not have that same problem. If there arises a dispute in the facts, the trial court can certainly go to the law library and read past cases to see

what fact patterns have fallen within or without this test.

A similar issue raised in the brief is that the definition given these two prongs of the Arizona test are unconstitutionally broad. In order to address overbreadth, this Court must begin its analysis with Lowenfeld v. Phelps.

Now, in Lowenfeld v. Phelps --

QUESTION: (Inaudible) in non-First Amendment case?

MR. McMURDIE: Your Honor, the contention is that it applies to too many or it applies to all first-degree murderers. Therefore, it doesn't genuinely narrow the classification.

But we -- when we address overbreadth you look at Lowenfeld where the aggravating factor simply mirrored an element to the first-degree murder. And in this Court, it said it would look to the entire --

QUESTION: Have we ever had a case that applies, quote, overbreadth, unquote, in a capital case?

MR. McMURDIE: No, Your Honor, I can't --

QUESTION: Why are you talking about it as though we had?

MR. McMURDIE: The contention was raised in Lowenfeld that the circumstance --

QUESTION: Well, I would think you would say

overbreadth doesn't apply.

MR. McMURDIE: That's correct, Your Honor. Overbreadth does not apply. But the aggravating circumstance, as defined, does genuinely narrow the classification, as taken in context with the entire Arizona scheme.

QUESTION: I must say I didn't really follow your argument based on Lowenfeld. That wasn't -- it wasn't this kind of aggravating circumstance, was it?

MR. McMURDIE: No, Your Honor. The contention in Lowenfeld was that the aggravating circumstance found simply mirrored an element of the crime. Therefore, it applies --

QUESTION: And if the crime is -- and that the category of people eligible for the death penalty was adequately narrowed by the definition of the crime. Isn't that what we had on that?

MR. McMURDIE: That's right. That the --

QUESTION: So what does that got to do with this case?

MR. McMURDIE: Like --

QUESTION: Because you don't rely on that. You contend you need the aggravating circumstance to narrow the class, don't you?

MR. McMURDIE: No. Arizona does not. We believe

that, like Louisiana, we have four classes of homicide and that when you get to the final classification then we have additional factors which narrow -- narrow the existence or those that are death eligible.

QUESTION: But isn't one of those the factor you're just talking about? Maybe I just don't follow you.

MR. McMURDIE: That's correct, Your Honor.

QUESTION: Oh.

MR. McMURDIE: One of those is the factor we're just talking about. Just like Louisiana --

QUESTION: So then it is necessary that that factor perform a legitimate narrowing function, isn't it?

MR. McMURDIE: No, because it didn't -- wasn't required in Lowenfeld. The factor found in Lowenfeld was simply mirrored in --

QUESTION: But your -- does your statute -- is your statute just as narrow as the Louisiana statute was?

MR. McMURDIE: Many of the cases that would fall within Louisiana would not be first-degree murder in Arizona and vice versa. But we're saying overall the effect is a genuine narrowing process. It does genuinely narrow those people that would be eligible for death.

QUESTION: I'm still puzzled. Are you saying then that the finding with respect to heinous and cruelty is superfluous?

MR. McMURDIE: Absolutely not. I'm saying Arizona has two levels of narrow --

QUESTION: Well, then if it's not superfluous, why -- why doesn't it have to perform a narrowing function? I don't understand your argument; I'm just -- I guess I'm thick.

MR. McMURDIE: No, Your Honor. Let me start one more time.

In Lowenfeld this Court said that the narrowing function took place when the juries found the first-degree murders -- the defendant guilty of first-degree murder.

QUESTION: As narrowly defined in that statute.

MR. McMURDIE: That is correct. But the person was not death eligible unless he had an aggravating circumstance. The aggravating circumstance simply mirrored an element of the offense.

Our cruel, heinous and depraved circumstance, while it may apply to many that are convicted of first-degree murder, it certainly does not apply to all of them. Therefore, it does serve a narrowing function.

But even like the Louisiana statutes, our -- our classifications of homicide does narrow those that would be eligible for death.

QUESTION: You are saying it's superfluous if -- if you're -- you're saying you wouldn't really have needed

that anyway.

MR. McMURDIE: That's correct.

QUESTION: But it's narrow enough without the cruel, heinous circumstance narrowing.

MR. McMURDIE: That is correct.

QUESTION: I -- I thought I also understood your response to Justice Stevens that it does perform some narrowing function.

MR. McMURDIE: That is also correct. It does it. We don't have to have it, but we do and it does perform that function. And when you look at the entire sentencing scheme, along with the homicide classifications, it is an additional safeguard to generally narrow the classifications.

QUESTION: Well, that's no different from the aggravating circumstances in any other death penalty statute.

MR. McMURDIE: It is no different than any other aggravating circumstance.

I would like to now address Petitioner's contentions regarding whether or not the Constitution prohibits the state from imposing an evidentiary burden of proof on a criminal defendant to show mitigation.

In order to understand this argument, the Court needs to understand exactly what analytical process the state

goes through to prove or to show the death penalty in Arizona.

The state proves the aggravation. At that point in time the defendant may present anything he or she desires in mitigation. The trial court is simply to consider those facts that it believes to be proved by a preponderance of the evidence and assign those facts it believes to be true mitigating weight.

The trial court then weighs and balances the aggravation and the mitigation and determines whether the mitigation is sufficient to warrant leniency.

The only burden placed on the defendant is that if he wants the trial court to consider facts and mitigation he must produce sufficient evidence for the court to believe that they are probably true.

The Arizona Supreme Court independently reviews the record to determine if all of the mitigating evidence was considered and then independently determines if they are -- if the Arizona Supreme Court is convinced that the death penalty is the appropriate sentence.

QUESTION: What if the trial judge thinks the evidence is in equipoise as to the existence of a -- of mitigating evidence? I take it under Arizona -- the Arizona statute he would be -- not be entitled to consider that mitigating evidence at all.

MR. McMURDIE: If he believes the defendant has failed to meet its evidentiary burden, then he is precluded from considering that.

QUESTION: What do you do about Mills?

MR. McMURDIE: Well, Mills is a different situation, Your Honor, because there the sentencer was the jury and one juror was controlling whether or not the mitigation was found. In this case --

QUESTION: Well, I know, but the -- but the -- so, the -- so the problem was unanimity, wasn't it?

MR. McMURDIE: That's correct.

QUESTION: And the net result of it even if -- even if it wasn't unanimous -- even if it was 11 to 1 that there was a mitigating circumstance, the -- or there was no mitigating circumstance -- one juror was still entitled under Mills to consider the mitigating evidence.

MR. McMURDIE: That is correct. The problem was the -- the requirement placed in Maryland that it be unanimous.

QUESTION: But the trial judge here is -- unless -- unless -- unless the evidence is -- the mitigating circumstance is proved by a preponderance to his satisfaction --

MR. McMURDIE: That is correct.

QUESTION: -- he will not consider it at all.

MR. McMURDIE: Because under the preponderance standard it means that it is probably not true.

QUESTION: Well, what were the -- were there specific examples here of efforts by the defendant to show mitigating circumstances which one of the Arizona courts said needn't be considered or shouldn't be considered because of failure of proof?

MR. McMURDIE: No, Your Honor.

QUESTION: Then why -- why is that question involved in this case?

MR. McMURDIE: The defendant makes a facial attack on the statute.

QUESTION: Well, I think we have to perhaps get back to what Justice O'Connor mentioned before. How -- how do we get facial attacks on statutes where we're not talking about the First Amendment?

MR. McMURDIE: Because the Ninth Circuit Court of Appeals held that our statute was unconstitutional on its face in that -- in that case. The Arizona Supreme Court has refused to go along with that decision. Therefore, we are in a conflict.

QUESTION: Do you think that our capital punishment jurisprudence says that you simply go through all the provisions of a statute in the abstract regardless of how they may have been applied to the particular defendant in

question and says, well, this is good, but this isn't?

MR. McMURDIE: No, Your Honor, I do not believe that is --

QUESTION: So you don't think there should be permitted a facial attack?

MR. McMURDIE: No, I do not believe that's the case.

QUESTION: But you're -- you're defending this because the Petitioner makes it?

MR. McMURDIE: I'm defending this because the Petitioner makes it and based on the Ninth Circuit's opinion there's a deadlock that cannot be resolved unless this Court resolves the issue.

In getting back to a related argument of Justice White's question, this Court in Franklin v. Lynaugh said that residual doubt to the ultimate penalty -- or, I mean, the ultimate guilt/innocent was not constitutionally required for the trial -- for the sentencing jury to consider.

If the trial court determines that it does not exist, the residual doubt on whether or not it was true should not be constitutionally mandated for the sentencer to consider.

This does not offend the common notions of decency as stated in Patterson v. New York where traditionally affirmative defenses in mitigation was placed upon the

defendant to prove the existence of such evidence.

Rational moral response requires that the sentencing court, in equating whether or not the death penalty to be imposed, rely on evidence that it has determined probably exists and not mere speculation. It ensures consistency and it ensures reliability.

The final issue that I wold like to address this afternoon is whether or not Arizona has a mandatory or presumptive death penalty.

I'm not going to take up this Court's time in going through all of the arguments proffered by the sister states of California and Pennsylvania. The State of Arizona agrees with the position taken by those states in those cases that are presently pending before this Court.

There is a difference, however, -- a slight difference -- between those cases and this case in that in Pennsylvania and in California the question is what a reasonable juror would -- or, jury would determine how it is to apply the instructions given.

In this case, the trial court may look at the law and review all of the cases to determine if there is an appropriate sentence based on the mitigation and the aggravation posed.

Regarding the first issue, that of judicial sentencing, it's the state's belief that this issue has

been resolved in its favor in Hildwin and Spaziano.

Therefore, Mr. Chief Justice, unless the Court has specific questions about that issue, I've concluded my remarks.

QUESTION: Well, is -- in your position -- is it your position that this is not an element of the offense?

MR. McMURDIE: Absolutely not. The Arizona Supreme Court has stated that in State v. Blazack, that it --

QUESTION: Well, is it a matter for state law to define what's an element of defense when a jury -- when the issue is whether you're entitled to a Federal jury trial?

MR. McMURDIE: It is within the purview of the state court to determine the purpose for which it -- those aggravating factors exist. And the Arizona Supreme Court has stated that the purpose of those factors is simply to channel or narrow the sentencing discretion, which is what was affirmed in Hildwin and which was affirmed in Spaziano.

QUESTION: Well, part of the sentencing process?

MR. McMURDIE: Absolutely. And that is what the Arizona Supreme Court has stated in rejecting that notion that is an element of the offense.

QUESTION: The -- the allegation that it was the defendant that pulled the trigger here, what particular

part of the Code does that come under? Is that a specific aggravating offense in a single clause?

MR. McMURDIE: That would not be an aggravating offense, the simple fact whether or not he pulled the trigger. That is not an enumerated aggravating circumstance.

QUESTION: That was relevant to the difference between a felony murder and a murder under -- a first-degree murder of another type under the statute?

MR. McMURDIE: That is correct, Your Honor.

QUESTION: Well, then why isn't that an element of the offense?

MR. McMURDIE: He was --

QUESTION: If it's not an aggravating factor, what is it then? And if it's not an element of the offense, then what is it?

MR. McMURDIE: He was -- he was convicted under first-degree murder. The jurors believed either that he himself did it or through accomplice liability he had -- he had committed that crime.

The only issue that was not made by a jury was the -- the -- the Enmund-Tison finding which was in fact made by the trial judge, which this Court has said was okay in Cabana.

QUESTION: Was -- was the fact that he pulled the

trigger relevant in the judge's aggravation/mitigation analysis?

MR. McMURDIE: The judge said it was relevant in determining mitigation because one of the proffered mitigating circumstances was that he -- his claim that I did not do it. And the judge said, I believe -- I believe you did beyond a reasonable doubt. So, it was relevant in that he rejected one of the proffered mitigating circumstances asked by defendant. But it did not go to the aggravation in any form.

QUESTION: And -- and how do you distinguish this from Justice Stevens' hypothetical in his separate opinion in which he said that it's like an assault and then the further inquiries whether it's assault with intent to kill or assault within the course of a rape?

MR. McMURDIE: The elements of whether or not the defendant is liable for first-degree murder have not changed. There -- they're still there.

Whether or not he is eligible for the death penalty is an Enmund-Tison question, which this Court has said in Cabana the trial court could make. The Arizona legislature --

QUESTION: How do we know the difference by looking to the face of the statute?

MR. McMURDIE: The difference between --

QUESTION: An -- an element of the defense and a factor that's used in sentencing?

MR. McMURDIE: Your Honor, you can simply -- in my state you can simply look at the purpose based on the legislative history of the aggravating circumstances.

In 1972 when Furman came down, the Arizona legislature convened a session to create in effect a new sentencing procedure. They did not change the substantive law.

In 1974 this statute was enacted, adding aggravating factors. In 1978 they revised the Code and then simply then redefined the crime. But it did not change the underlying basis that these factors are what the Arizona legislature has determined is the objective standard by which the sentencers are to channel or to narrow those that would be death eligible.

But it has never changed or altered the elements of offense as defined by the Arizona legislature for first-degree murder. This is not an attempt to circumvent the Sixth Amendment right.

QUESTION: Thank you, Mr. McMurdie.

Mr. Ford, you have six minutes remaining.

REBUTTAL ARGUMENT OF TIMOTHY K. FORD

ON BEHALF OF THE PETITIONER

MR. FORD: Justice Kennedy, you won't find the word -

- the phrase "elements of the offense" anywhere in the Arizona statute. They don't say anything as an element or not that has to be decided by what the thing does.

With regard to the defendant's having actually committed the actus reus, pulling the trigger, the aggravating factors that were found here under the statute are -- and, unfortunately, one of the things that happens when you get sloppy with judge sentencing is, if you'll notice, the judge's findings are not even in the words of the statute.

But the statute says the defendant committed the murder in a heinous, cruel or depraved fashion, especially; the defendant committed the murder for expectation of something of pecuniary value. That's a paraphrase.

And, of course, the essence of the judge's finding that this was heinous -- or at least the Arizona Supreme Court's finding -- gloss on in. What they say was heinous about it is that Mr. Walton pulled the trigger. That's what made him eligible.

That is the issue. Every issue, actus reus, mens reus, down the line, is converted. And the answer that Arizona gives is the one that they have here. We call it sentencing. And when we call it sentencing, the Sixth Amendment vanishes and the right to jury trial vanishes.

I don't think that that is a sufficient answer. I don't think that the phrase "element of the offense" or "aggravating circumstance" is a talisman. This talisman is the phrase "trial by jury." And that is what the Sixth Amendment framers I believe had in mind on this kind of question. The --

QUESTION: Rather, if you just left it to the judge and didn't specify what particular criteria would determine the severity of the sentence -- let's say you leave it to the judge to pick between a fine and imprisonment, which also differs in the terms "life, liberty or property" -- it's the difference between property and liberty -- you could leave it entirely to the judge.

So long as you don't specify how it will make the difference, it would be perfectly okay to have the judge make factual findings, on the basis of which he makes that judgment.

MR. FORD: It's --

QUESTION: But your position is that if the state says that you can only give imprisonment if you find a certain fact, then it has to come out of the sentencing judge and go to the jury. Even in a noncapital case.

MR. FORD: That's right. Spaziano I think says that those sentencing determinations can be left to the judge.

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That was done in -- in the 18th and 19th century. There's no question about it. And the fact that modern statutes require judges to give reasons why they did it so there can be appellate review, that doesn't change it.

QUESTION: Why does it cease to be a sentencing determination simply because you specify?

MR. FORD: Well, when you specify -- because there -- the line between where we are and Justice Stevens' hypothetical and McMillan vanishes because there no longer is any answer left except we called it sentencing, therefore, it's okay.

Every other answer is -- has fallen. And this Court has let the states, I think by Hildwin and Spaziano, go as far as it possibly can preserving that core of Sixth Amendment trial by a jury. But if it goes this additional step, the core is gone.

And there is nothing that anyone has suggested at any level -- and we've argued this many times -- that will be left to say, states, these things are what the framers meant in 1791 when they said there will be trial by jury in criminal cases.

As there was -- as it was fought for in William Penn's case and John Peter Zenger's case where the judges tried to say, oh, well, the libelousness is a question of law, we'll take that away, the Colonists said no. And

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Zenger's case was very much in the minds of the framers of the Constitution and Blackstone and the people who they were looking to understand why -- it tells us why they put those words in the Constitution twice.

The -- the cruelty question, the third question -- the heinous, cruel and depraved -- if the Court looks at the previous Arizona cases, they will see this evolution.

Those facts -- no previous case had found, as this one does, that the uncertainty as to fate is enough to constitute cruelty. It was a fact that in some of these previous cases people had been uncertain. But what happens when you have the appellate court with no specific touchstone, it evolves and the things that were incidental in one case become important in the next case, become sufficient in the third case.

And if you'll look at the cases the state has relied on, you will find that. Think if -- where -- where would we be now under the -- under the Arizona's rational -- had -- there had never been an intentional homicide here had there been a police chase while they were on their way out into the desert and there had been a crash. Mr. Powell would have died in the course of a felony even though unintentionally and he would have feared for his life. It would have been cruel. They have expanded it that far.

If you had the classic law school example of walking

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into the convenience store and pulling the store and pulling the gun and the person has a heart attack. That fear would be painful. The rhetoric of a prosecutor could say, imagine the pain, imagine the fear, imagine the agony. The defendant should have known he would have done this.

And that rhetoric can drive the rage that people feel when these homicides occur and cause death to be imposed in a fashion that is not regular and arbitrary. And we have cited many, many cases where Arizona judges, like the prosecutor in this case and like the trial judge in this case, at least by his ruling, did not understand that this was the rule.

If you look at the prosecutor's argument, he wasn't talking about what the Arizona Supreme Court ultimately held. He had a completely different idea of what the statute meant.

Our -- the middle issue which I did not address is not here as an abstract issue. There was serious mitigating evidence in this case which was brought forth in a very haphazard fashion because we live in an imperfect world and because judge sentencing in Arizona is a very informal process.

But we know Mr. Walton had a terrible childhood, he had a drug abuse history, he was living in poverty at the

time of this crime. All that came in in a very vague undefined fashion and there is no indication it was given any weight by the trial judge. We have to assume that was because of the statute.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ford.

The case is submitted.

(Whereupon, at 2:46 p.m., the case in the above-entitled matter was submitted.)

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NO. 88-7351 - JEFFREY ALAN WALTON, Petitioner V. ARIZONA

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BY alan Friedman

(REPORTER)